No. 2884

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,
vs.
BENJAMIN E. BOONE, INC., a corporation,
BENJAMIN E. BOONE and BENJAMIN E. BOONE, INC., a corporation,
D. R. BOONE, and NORA CARLYLE, a co-partnership, doing business as BENJAMIN E. BOONE & CO.,
Defendants and Appellees.

BRIEF OF PLAINTIFF AND APPELLANT.

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT.

Plaintiff in this suit is a Michigan corporation engaged in the manufacture of automobiles and auto-

mobile parts and selling the same under the general designation of "Ford."

In order to reach the widest market plaintiff has developed a highly organized and extensive system of agencies under which it appoints in the states, counties, towns and villages throughout the United States and elsewhere, where its product is sold, certain individuals, firms and corporations to act as its agents, each in a defined territory carefully specified in the contract of agency.

On the appointment of such agents plaintiff enters into written contracts with them, carefully defining the duties and powers of such agents and restricting their authority within certain limits.

Plaintiff does not sell its automobiles to wholesalers, dealers or others, but, through its said agents, itself sells directly to the individual member of the community who buys for his own use.

The Ford is perhaps, the most widely known automobile in the United States and agency contracts with the plaintiff are eagerly sought because the agent thereby secures the representation of a product sure to sell and out of which the agent can earn a sure and fixed commission. The widespread demand for Fords and the ease with which they can be sold makes an agency so desirable that agents will submit and agree to conditions in the agency

contract, and accept burdens which perhaps they would be unwilling to accept with any other automobile on the market.

The contract appears in full on pages eighteen (18) to thirty-seven (37), inclusive, of the transcript of record, and it will not be necessary at this point to copy that contract in full. It will, however, be proper to copy here portions thereof which have particular bearing on the questions presented by this appeal.

"1915—SUB-LIMITED AGENCY CONTRACT—1916."

"THIS AGREEMENT, made at Highland Park, Michigan, this 2d day of August, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party and Vick Bros. of Salem in the State of Oregon, hereinafter known as the second party, and S. E. Brune & Son of Woodburn, in the State of Oregon, hereinafter known as the third party, WITNESSETH:

"WHEREAS the first party is a manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

"WHEREAS the second party is the Limited Agent of the first party within certain territory including that hereinafter described for the sale of Ford automobiles and parts under certain defined and limited restrictions, and

"WHEREAS the third party has applied to the first party to be agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first and second parties are willing to appoint third party, with certain limited authority and upon the following terms and conditions only:

"APPOINTMENT AS SUB-LIMITED AGENT.

"NOW, THEREFORE, this witnesseth:

"(1) That second party hereby designates and the first party hereby confirms the third party as Sub-Limited Agent with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

"(2) That third party shall have no au-

thority or power or duty whatsoever, except as herein expressly conferred.

"AUTOS ON CONSIGNMENT.

"(3) That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

"TERRITORY.

"(4) That third party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and no other, namely:
* * * * *

"DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

"(5) The sales of Ford automobiles to residents outside of third party's own territory is a serious trespass upon the rights and earnings of other Limited Agents, and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the

territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, * * * * *

"PRICES.

"(6) Third party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 ($53.25) Dollars for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List Price" are used herein they mean the latest retail selling price established or fixed by the first party.
* * * * *

"CHANGES IN PRICE.

"(9) The first party may change the list prices of any of its products at any time it may choose, and third party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices first party shall

not be bound to make any allowance to third party in cases of automobiles shipped before such changes take effect, and the third party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price, provided;that in case of a reduction in price there will be allowed to third party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction ah to automobiles shipped to the third party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

"ADVANCES.

"(10) Third party shall advance in cash to second party or first party as the case may be, eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles to third party.

* * * * *

"TITLE OF AUTOS.

"(12) First party shall retain all and complete title to each automobile until actual

bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is ,one who has purchased for immediate use and not to re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

"LIEN FOR ADVANCES. INSURANCE.

"(13) Third party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and shall keep and maintain insurance so as to protect himself against loss.

"RETAIL BUYERS' ORDERS.

"(14) Third party shall take from each proposed purchaser of a Ford automobile and immediately forward to second party for the first party, a written order duly signed by him, upon the regular blank "Retail Buyers' Order," furnished by first party,

without alterations or changes except the filling in of blanks, and third party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

"DEPOSITS OF AUTOS.

"(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with Retail Buyers' Order to the second party for the account of the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

"COMPANY MAY REJECT ORDERS.

"(16) The dealings of the third party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

"WARRANTY.

"(18) Third party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyers' Order and Bill of Sale in that behalf.

* * * * *

"CLAIMS AGAINST CARRIERS.

"(20) In case of damage to automobiles by carriers in transit to third party, collections from the carrier shall be made in the name of the first party as the owners of such automobiles—

* * * * *

"THEFT OR DAMAGE OF AUTOS. FIRST PARTY NOT LIABLE FOR DAMAGES.

"(22) Third party shall safely keep and he hereby agrees to save first party harmless against theft or damage of any kind to said Ford automobiles while in his possession under consignment and in consideration of his being granted this agency, he expressly agrees that he will bear all damage or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him

while in his possession, or while in transit from first party or second party to third party.

* * * * *

"(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the "Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising." * * * * *

"PATENTS.

"(27) First party owns, and the Ford au-

tomobiles are manufactured under, and embody the following letters patent of the United States, or some of them, namely: * * * *

"COMMISSIONS.

"(28) As third party's commission for making such sales of Ford automobiles, first party will after payment by the purchaser, allow to third party (except in cases specified in sub-division nine hereof) fifteen per cent (15%) of such full advertised price list, and will allow to third party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

"ADDED COMMSSIONS.

"(29) First party agrees to allow and pay to third party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than $5,000.00, but when the third party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of $5,000.00, his right

to additional commissions shall begin, and he shall be entitled to such added commissions as follows: * * * * *

"STOCK OF FORD PARTS.

"(31) Third party agrees that he will purchase from the first party on his own account and carry on hand at third party's place of business aforesaid a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Hundred Dollars ($200.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as third party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford automobiles is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the third party also hereby agrees that all his purchases of parts of Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

'DISCOUNT ON PARTS.

"(32) First party agrees to allow the third party a discount of Twenty-five per cent (25%) on all parts of Ford automobile listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of third party's agreement to carry stock as provided in subdivision thirty-one above, and in consideration of the other provisions of this contract.

* * * * *

"PAYMENTS AT HOME OR BRANCH OFFICE.

"(38) The third party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by third party.

* * * * *

"ESTIMATE OF AUTOS REQUIRED.

"(40) In order that the first party may

determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the third party agrees that he will require consignments of not less than 22 Ford automobiles for his said territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely: * * * * *

"METHODS OF TRANSACTING BUSINESS. SAME MAY BE CHANGED.

"(44) The intention of the parties is that third party shall transact his business with first party through the second party—receive the consignments of automobiles through second party, make advances to second party, make remittances and deposits through second party, make his reports and send his Retail Buyers' Orders, receive his payments or commissions and the like through the second party, and generally transact his business under this contract through the second party; but all final authority and direction shall rest with the first party, who may order or direct any change in methods of business either in particular instances or in general, as it

may deem best, and the second and third parties shall conform thereto.

*   *   *   *   *

"CANCELLATION.

"(46) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either the first or third party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the third party prior to the date when such cancellation takes effect.

"SALE OF AUTOS ON HAND AT TIME OF TERMINATION.

"(47) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as third party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements

on the said automobiles; or at the option of the first party it shall be the duty of the third party and he undertakes (for the purpose of winding up the affairs of his said Sub-Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of third party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request of third party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said third party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

* * * * *

"NO WAVER OF THESE PROVISIONS.

"(49) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the third party of any of the

provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

"MICHIGAN CONTRACT.

"(50) This contract, it is agreed, is a Michigan contract and shall be construed as such."

The contract referred to and thus quoted from is of the general class denominated as sub-limited agency contracts.

Those agents with a wider territory, whose jurisdiction covers the sub-limited agents, are called limited agents but are under the same general restrictions as the sub-limited agents.

Agents of the Ford Motor Company are required by their contracts not only to find purchasers for Ford automobiles but they are also required to maintain places of business and repair shops at which purchasers of Ford automobiles can obtain that class of service which the authorized agents of the Ford Motor Company are obligated by their contracts to give, and which purchasers of Ford automobiles are entitled to receive. In other words

purchasers of Ford automobiles obtain by their purchase not merely the machine, but a connection with all the agents of the manufacturer wherever situated, which entitles them, as owners of Ford automobiles, to the benefits of Ford service. Such purchasers acquire the right to service provided for by the twenty-fifth (25) condition of the contract between the plaintiff and its agents, wherein it is provided that, "Third party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform the work promptly and in workmanlike manner."

The agent is further bound by his contract (Condition 21) to "maintain on his own account and at his own expense a place of business and properly equipped repair shop." He also agrees (Condition 31) to "carry on hand a stock of Ford parts."

When a person or corporation is appointed as a Ford agent and holds himself out to the public as such there follows a representation to the public that purchasers of Ford automobiles through such agent will receive not only the machine, but also the right to the class of service provided for.

In perfecting this service and apprising the public thereof plaintiff has adopted certain forms and styles of advertising and has spent large sums of money therefor, and has acquired and made use of

certain trade marks and as a result thereof these trade marks have come to the public to mean certain things and to indicate what we have attempted to describe as Ford service and to convey to the public the knowledge and belief that the person making use of these words, expressions and trade marks is an authorized agent of the plaintiff for the sale and distribution of its product.

The case comes before this court on bill of complaint and motion to dismiss. The motion confesses the truth of all the allegations of the bill, and in the argument before this court we are entitled to assume that the defendants concede and admit the truth of all the allegations of the bill, for that is the effect of their motion.

Defendants are charged, and, by their motion admit, that they have pretended to the public that they were Ford agents, when as a matter of fact they were not such agents. They are charged, and they admit by their motion, that they have misused the words, signs and trade marks of the plaintiff to the injury of plaintiff and deception of the public, and that the same was done "with the deliber-

> ately fraudulent intent and purpose of defrauding the plaintiff and its duly authorized agents and of misleading the public and prospective purchasers of Ford automobiles to believe that said defendants are authorized to arrange for the sale of Ford Automo-

biles in Portland, Multnomah County, Oregon, and elsewhere, and to mislead and deceive said prospective buyers into the false supposition that they are entitled to receive from defendants all the benefits which they might lawfully receive from bona fide agents of this plaintiff." (Transcript p. 13.)

It is further charged and admitted by the bill that the defendants importuned agents of the plaintiff

"to breach their said contract with plaintiff herein and did in collusion with said agents, fraudulently cause to be made and sent in to plaintiff's factory branch, fictitious orders for Ford cars and forthwith caused the Ford cars ostensibly ordered by said persons for disposition in vicinities of Woodburn, Marion County, Oregon, and Kelso, Cowlitz County, Washington, and elsewhere, to be driven or shipped by a roundabout course without plaintiff's knowledge, to the defendants' place of business said automobiles, all for the purpose of obtaining fraudulently, unfairly and in violation of the rights and contracts of plaintiff, and its authorized agents, certain Ford cars for the purpose of lending color to the false and fraudulent representations of defendants that it is plaintiff's authorized agent in the territory wherein defendants'

place of business is located." (Transcript pages 10 and 11.)

There are other charges in the bill in detail showing other acts and things done by the defendants for the purpose of injuring the plaintiff.

It is apparent from the record and from the opinion of the District Court, found on pages 44 and 47 of the transcript, that the trial court conceived and held that the contract between the plaintiff and its agents was not what its language meant, but instead thereof evidenced an absolute sale by the plaintiff to the particular agent, and an attempt to control the price and conditions of a subsequent sale by the agent to a member of the public, in violation of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Act. It becomes therefore, necessary to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—a contract for the purpose of appointing an agent and providing for the consignment to such agent of automobiles for sale by the plaintiff through its agent to the public or whether the court is justified upon the bill and motion to dismiss, to infer and hold that the contract of agency is not what it purports to be, but a mere subterfuge to conceal a sale for the purpose of enabling the manufacturer to control the prices at which dealers shall vend Ford automobiles to the general public.

It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment and to be interpreted according to the language and intentions of the parties, but that the court is limited to the consideration and construction of the actual contract made and may not construe some other different contract which counsel may think or claim or suggest as the real contract, made under cover of an agency contract, for the purpose of evading the Sherman law.

ASSIGNMENT OF ERRORS.

The Transcript of Record shows that the appellant has made thirty-one assignments of errors. Numbers six to thirty-one inclusive present in varying phraseology and possibly with some apparent repetition the main points relied on to sustain this appeal. The first five errors assigned, though relied on, are of minor importance as compared with the main questions involved in this case.

Briefly stated the plaintiff will maintain that error was committed in not holding that the words "Ford," "Fords," "Ford Motor Cars," "Ford Automobiles" or "Ford Distributors' " and the script word "Ford" and the Ford "winged pyramid" trademark were trade names, symbols and rights and that

they were being wrongfully and illegally used by defendants in refusing to enjoin their further use in the manner set forth in the complaint.

That error was committed in denying validity to a solemn contract, and in the refusal of the court to enjoin defendants from persuading the parties to that contract to breach the same and otherwise violating the rights of plaintiff as set forth in the complaint.

The court further erred in holding the result of that contract to be a sale rather than what the contract specified and contemplated.

The court erred in holding that plaintiff did not have the right to fix the prices at which the agents under said contract should sell the product of plaintiff's factories and that the attempt to do so violated the Sherman law.

The contract shown in the record is the basis of plaintiff's plan of marketing its product and most of the questions raised lead to the contract, and upon its validity depends the right of plaintiff to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it.

But the other errors relied on raise the further question that if the agency contract be construed as

a sale to the agent, nevertheless it must be held to be a sale subject to the restrictions lawfully imposed by plaintiff.

POINTS AND AUTHORITIES.

I.

Defendants, by their motion to dismiss have admitted the truth of all the allegations of the complaint.

II.

The unauthorized and wrongful use of the trade name and trade mark of plaintiff, and other similar words or phrases, for the purpose of diverting plaintiff's trade from plaintiff or its duly authorized agents constitutes unfair competition, and an injunction should be granted against its continuances.

Ford Motor Co. v. Fred Buck, (unreported case), U. S. District Court, Northern District of Illinois, Eastern Division, Dec. 3, 1914.

C. F. Simmons Med. Co. v. Mansfield Drug Co., 93 Tenn. 84.

Consolidated Ice Company v. Hygiene Distilled Water Co., 151 Fed. 10.

Nims on Unfair Business Competition. pp. 9-28-31-35.

III.

An actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and, in the absence of an adequate remedy at law, equitable relief will be granted.

Angle v. Chicago, St. Paul M. & O. Ry. Co. 151 U. S. 1, 38 L. ed. 55.

Bitterman v. Louisville & Nashville Ry. Co. 207 U. S. 1, 38 L. ed. 171.

IV.

The contract set out in the complaint creates an agency and results in a bailment to the agent, not a sale.

Strum v. Boker, 150 U. S. 323, 37 L. ed. 1093-9.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.)

Harris v. Coe, 71 Conn. 163, 41 Atl. 554.

V.

A manufacturer has the right to fix the prices at which its sales agent shall sell and in the territory in which it may sell.

Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393.

Waltham Watch Co. v. Keene, 202 Fed. 225, 240.

Cole Motor Car Co. v. Hurst, 228 Fed. 280, (C. C. A.)

Whitwell v. Continental Tobacco Co., 125 Fed. 454.

VI.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940.

VII.

Where the contract does not in its terms create

a restraint of trade, some evidence of an unlawful intent becomes essential.

> **Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 728 (C. C. A.).**

> **Cincinnati P. B. S. & P. Packet Co. v. Bay 200 U. S. 179-184, 50 L. ed. 428.**

VIII.

A patentee has an exclusive right to make or use or sell the patented article or to permit to others those rights or any one or any part of them.

> **Paper Bag Patent Case, 210 U. S. 424, 52 L. ed. 1122.**

> **Bement v. National Harrow Co. 186 U. S. 70, 46, L. ed. 1059.**

IX.

Courts are unwilling to put limits on the exercise of the privileges granted to a patentee by law, recognizing that as a function of Congress.

> **The Button Fastener Case, 77 Fed. 288-294.**

X.

Even if the contract could be construed as effecting a sale to the agent, nevertheless such sale

would be a sale subject to conditions and restrictions and the courts recognize the right of a patentee to attach conditions to a sale of the patented article.

> Keeler v. Standard Folding Bed Co. 157 U. S. 657, 39 L. ed. 848.
>
> Bement v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1059.

XI.

Only a sale **without condition or restriction** will pass the patented article out from under the monopoly which the law secured to the patentee. This limitation is recognized in all the cases.

> Henry v. Dick Co. 224 U. S. 1, 56 L. ed. 645.
>
> Bement v. National Harrow Co. 186 U. S. 70.
>
> Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.
>
> Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52 L. ed. 1086.
>
> Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

XII.

An agent or vendee of a patentee may, by direct

covenant or agreement, be bound to the observance of price restrictions, imposed as a condition upon which right of sale is exercised.

> **National Phonograph Co. v. Schlegel, 128 Fed. 733.**
>
> **Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 154 Fed. 359 (C. C. A.).**
>
> **American Graphophone Co. v. Boston Store, 225 Fed. 785.**

XIII.

Competition is not affected by a contract between a patentee and his agents whereby the sale price is fixed.

> **Blount Mnfg. Co. v. Yale & Towne Mnfg. Co. 166 Fed. 555.**
>
> **Virtue v. Creamery Package Mnfg. Co. 227 U. S. 32, 57 L. ed. 393.**

XIV.

In all the cases is found a recognition of the **distinction between** the right of a patentee to fix prices by **direct contract** and the attempt to do so by **mere notice** affixed to the article.

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52 L. ed. 1086.

United States v. Keystone Watch Case Co. 218 Fed. 502.

"TRUST LAWS AND UNFAIR COMPETITION" issued by the Government Printing Office in 1916, pp. 579-580, 592-593, 651-652.

XV.

But if we should concede the construction of the contract asserted, nevertheless there has been no restraint of trade as measured by the rule of reason.

Whitwell v. Continental Tobacco Co. 125 Fed. 454 (C. C. A.).

Phillips v. Iola Portland Cement Co. 125 Fed. 594-5 (C. C. A.).

Bigelow v. Calumet & Hecla Mining Co. 167 Fed. 704-712.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.).

O'Halloran v. American Sea Green Slate Co. 207 Fed. 187-190.

United States v. Hamburg-American S. S. Line, 216 Fed. 971-2-4.

United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243.

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232.

ARGUMENT.

I.

This suit is an application to the Court by the Plaintiff for relief against the Defendants by way of injunction restraining Defendants from violating certain rights of Plaintiff. The matter comes before this Court upon the Bill of Complaint and a Motion to Dismiss, and, of course, the rule applies that by a Motion to Dismiss the Defendants admit the truth of all the allegations of the complaint, and contest only the sufficiency of those allegations to entitle Plaintiff to relief in a court of equity.

Plaintiff has invoked a rule that is said in **Dr. Miles Medical Co. v. Park, 220 U. S. 394, 55 L. ed. 513,** to be

> "the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law equitable relief will be granted." Sarah R. Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 151 U. S. 1, 38 L. ed. 55; Marcus K. Bitterman v. Louisville & Nashville Railway Co. 207 U. S. 205, 52 L. ed. 171, 12 A. & E., Ann. Cases 693.

It appears from the complaint that the plaintiff has developed and perfected a system of selling the automobiles manufactured by it, and in carrying out that system, it appoints numerous agents and enters into contracts with them, and a copy of that contract is set out in the record and made a part of the complaint.

It is the contention of the plaintiff that this contract is only what it purports to be, a contract of agency and bailment between the plaintiff and its agents. The District Court held that the contract resulted in a sale from the plaintiff to its agents of the automobiles consigned by the plaintiff to its agent, that the absolute and unconditional property passed from the plaintiff to the agent, and that the automobiles thereby became the agent's automobiles, to do with as he chose, notwithstanding the

existence of the contract. In effect, the Court held that the contract was a subterfuge adopted for the purpose of concealing the true nature of the transaction, under the guise of an agency, for the purpose of projecting plaintiff's control over the subsequent disposition of the automobiles by the agent.

Disregarding the fact that the contract between the plaintiff and its agent is clear and definite in all its terms, and precise in its use of language, and no word can be found therein which even squints at a transaction of sale, nevertheless the language was construed to be a cover for an ulterior purpose of evading the law against combinations in restraint of trade.

From the premise that the transaction was a sale, thus assumed, the Court drew the conclusion that the transaction, or series of transactions, carried on under this and other similar contracts, were in restraint of trade and in violation of the Sherman Law. We believe it is capable of demonstration that the transaction was only what it purports to be—a contract of agency and bailment between the plaintiff and its agent, and that, therefore, the Sherman Law has no application to transactions under such contract, but further that the negative argument thus imposed upon us is a violation of the rule that a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established

facts, and that it was incumbent upon our opponents to demonstrate in some way, and offer some facts to support the claim that the transaction was actually a sale under cover of an agency contract, and we contend further that even if it should be held that the net result of the transaction between the plaintiff and its agent was a sale by the plaintiff to the agent of the automobiles manufactured by the plaintiff, nevertheless the transaction was not obnoxious to the Sherman Law, as interpreted by the Supreme Court.

It is the position of the plaintiff that the agency contract under which it consigns automobiles to its agents creates a contract of bailment between plaintiff and its agents, and that thereunder the automobiles remain the property of the plaintiff until sales have been arranged by the agent on behalf of the plaintiff under the terms of the contract itself, and upon conditions specifically set forth.

II.

THE CONTRACT ITSELF.

We rely upon the provisions of the contract itself as demonstrating that a bailment is the relationship created by the contract between the plaintiff and its agent. The preamble states:

"Whereas the second party has applied to

the first party to be the agent in certain territory hereinafter described for the sale of said automobiles and parts, and the first party is willing to appoint second party with certain limited authority upon the following terms and conditions only."

Thereupon follow paragraphs appointing the agent—

(1) "With certain authority as here expressly stated only, for the purpose of negotiating sales of the first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

(2) "That the third party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

(3) "That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for resale, upon bills of sale to be executed by the first party only, as hereinafter provided."

The next paragraph limits the territory in which the agent may sell, and there follows a statement of agreed damages and penalties for any violation of the territorial restriction.

It is further provided that the agent will arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, and the right is reserved by the plaintiff to change the list prices of any of its products at any time it may choose, and the duty is imposed upon the agent to conform to such changes immediately upon receiving notice thereof.

The tenth condition of the contract is presumably the basis of the inference that the contract constitutes a sale only, and that all the other provisions thereof are subterfuges to conceal the sale.

> (10) "Third party shall advance in cash to second party or first party, as the case may be, 85 per cent of the full advertised list price at the time of its consignment of automobiles to third party."

The next condition provides that the agent shall pay all freight from the factory to the agent's place of business, but the thirteenth condition provides that the agent shall have a lien on each automobile for the 85 per cent advanced by him and for the freight paid by him, and he is required to maintain insurance to protect himself against loss.

The twelfth condition of the contract provides that the plaintiff shall retain complete title to each automobile until actual bill of sale signed and exe-

cuted by it has been delivered to the vendee secured by the agent, and that such vendee must be one who has purchasd for use, at full list price plus freight and delivery charges, and that any attempt to sell or dispose, or deliver any Ford automobiles at less than such price, should be utterly void and pass no title.

Condition 14 of the contract requires that the agent shall take from proposed buyers a signed order to be transmitted to the plaintiff, which reserves the right to accept or reject the same for any reason satisfactory to it. (Condition 16.)

It will be noted in the clauses thus stated that by the contract the agent has no authority except that expressly conferred and that the agent receives a consignment of automobiles which are to be sold by the plaintiff not the agent, upon bills of sale executed by the plaintiff, and the contract expressly provides that the duties of the agent are to arrange for sales of automobiles, retaining in the hands of the plaintiff the power to sell or refuse to sell, and to change the prices of its product at any time it may choose.

The fact that an agent, desiring to obtain the agency for the handling of Ford automobiles, is willing to, and does agree to onerous conditions, does not justify an inference that the cash advanced by him pursuant to the contract was not actually

an advance, but a payment, whereby the title passed and the agent became the actual owner of the automobiles consigned.

It has always been a rule of law that contracts are construed to mean what they say. If the language used is simple, and the intention expressed is clear, then such contracts are enforced as expressed, if no violation of the law is thereby accomplished. Applying these rules, there can be no question but that the plaintiff clearly and effectually retained title to consignments of automobiles to the agent until all the conditions of the contract were fully complied with. It is violative of the language of the contract, and it is an inference from nothing contained in the record, to assume that the advance of 85 per cent, provided for in the contract, was not what the parties contracted it to be, but a payment of the full purchase price, resulting in a sale. Why should the agent contract, as in Condition 13, for a lien for his 85 per cent advance if by the transaction he became the owner of the automobiles? The owner of property cannot and need not for any advantage to himself, have a lien upon his own property, and the agent in the contract under consideration expressly accepted a lien on the automobile for his 85 per cent advance, and thereby expressly waived any claim to be the owner thereof.

A reading of the contract will disclose further conditions which negative the contention that the

agent became the owner of the automobiles, and not a word anywhere in the contract, directly or by logical inference, from which the affirmative of that proposition can be even inferred.

Condition 19 provides that the agent shall have no authority to warrant any of the automobiles, although warranty is an incident of ownership, and Condition 21 provides that in case of damage to automobiles by carriers in transit to the agent, collection from the carrier shall be made in the name of the plantiff as the owner of such automobiles, thus affording another conclusive indication of ownership in plaintiff.

By contrast, Condition 31 shows the careful choice of language by the parties to this contract. Automobiles could come into the agent's hands by consignment only, but parts he was required by this paragraph of the contract to **purchase** and carry on hand.

Condition 24 provides for signs and advertising by the agent under the direction of the plaintiff and a removal and discontinuance thereof at the termination of the agency.

Condition 47 of the contract contains another and also a conclusive demonstration of the proposition that the contract was a true consignment and not a sale, wherein it is provided that in event of cancellation or expiration of the contract, first

party to the contract, (the plaintiff) may at its option re-take possession of all such automobiles as the third party, (the agent) may have on hand on consignment unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles, or at the option of the first party, it shall be the duty of the third party, to endeavor to sell such remaining automobiles, notwithstanding the expiration of the contract, but if, at the end of three months he shall not have made such sales, the first party agrees on request of the agent, upon payment of 10 per cent additional of the list price, to sell said automobiles outright to the agent.

A contract right on the part of the consignor to take back property sold and return the consignee advances is as clear a negative of the assertion that the transaction was a sale by which the title passed as it is possible to conceive of, and if title had already passed and the automobiles became the property of the agent, why should he pay an additional 10 per cent, or receive a bill of sale of property already his?

By the preceeding clause of the contract, (Condition 46) either party to the contract, "shall be at liberty, **with or without cause,** to cancel and annul this contract at any time."

If a sale had taken place as to automobiles con-

signed to and in the agent's hands, nothing would remain on a cancellation of the contract except to settle any balances not adjusted and the Ford Company could not re-take by refunding the price.

But Conditions 46 and 47 are not capable of such an interpretation, and demonstrate that there was no sale, and that the Ford Company could at its option re-take its machines and refund to the agent his advances.

The plaintiff in this case has deemed it to be for the best interests of its trade to retain itself control of the distribution of its product to actual users thereof rather than to sell the same outright to wholesalers and retailers and permit them to distribute on such terms as they may see fit.

Plaintiff believes that it is for the advantage of the manufacturer of a product of wide and general use by the public, to so deal with the public that each member thereof may feel that he is receiving as good consideration and treatment as each and every other member of the public, and only by retaining in its own hands contact with ultimate consumer can this uniformity of treatment be secured.

III.

UNFAIR COMPETITION.

This very proper desire on the part of plaintiff

to protect the public constitutes one very potent reason for the objection urged against the unfair competition charged against defendants in doing the acts complained of in paragraph XV of the complaint (Transcript of Record, pp. 9 et seq.) subdivision (a), (b), (c), (d), (e), (f).

The grounds of relief discussed in parts III and IV of this brief seem to have been ignored by the District Court.

Defendants by the motion to dismiss admit that the acts complained of were done "with the deliberately fraudulent intent and purpose of defrauding plaintiff and its duly authorized agents and of misleading the public * * * and that said sign displayed as above mentioned * * * (and other acts set out) have been done * * * with the fraudulent intent and purpose on the part of defendants of defrauding plaintiff and its authorized agents and the public" (Transcript of Record, pp. 12-13).

It is unnecessary to quote from the decided cases to demonstrate that such conduct was unfair competition and should be enjoined by a court of equity.

> **Nims on Unfair Business Competition, pp. 9-28-31-35.**

IV.

IRRESPECTIVE OF THE QUESTIONS

ARISING OUT OF THE PATENTS INVOLVED, WE SUBMIT THAT PLAINTIFF'S LIMITED AGENCY CONTRACT AND OTHER CONTRACTS WITH ITS AGENTS CONSIGNING FORD CARS TO THEM AND GRANTING TO EACH AGENT THE EXCLUSIVE PRIVILEGE OF ARRANGING FOR SALES OF FORD CARS WITHIN ANY PARTICULAR OR ALLOTTED TERRITORY, ARE VALID AND WILL BE PROTECTED BY THE COURTS, AND THAT THE DEFENDANTS WERE GUILTY OF UNWARRANTED AND MALICIOUS INTERFERENCE WITH SUCH CONTRACT RIGHTS.

There is no doubt of the vicious and unlawful acts of the defendants in inducing plaintiff's agents to break their contracts. There is no doubt that law and equity both denounce and give remedies for wrongs in all such cases—the only question being as to whether the particular contract is valid.

There is no authority against the validity of the plaintiff's contracts alloting particular territory to particular sales agents. It is simply a question of whether the public rights in freedom of trade have been violated.

An examination of the bill of complaint discloses that plaintiff's grants to each of its licensed agents

a particular and exclusive territory within which such agent is licensed to solicit and arrange sales of Ford cars. The licensed agent in return agrees that he will only solicit and arrange for sales within this particular territory. The courts uniformly uphold contracts granting an exclusive agency within a limited territory.

Wood, etc., Machine Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L. R. A. (N. S.) 501.

Keith v. Optical Co. 48 Ark. 138.

Roller v. Ott, 14 Kan. 609.

Newell v. Meyendorff, 9 Mont. 254.

Ewing v. Sewing Machine Co. 9 W. N. C. 272.

The bill shows clearly the persistent and continuous efforts of defendants to procure automobiles from the licensed agents in violation of their contracts with plaintiff, and by inducing them to break such contracts by sending in to plaintiff fictitious orders and by inducing them to deliver such consigned automobiles outside their own territory to defendants, and widespread advertisements of defendants offering to sell such Ford automobiles so wrongfully obtained at reduced prices, regardless of the territory, thereby injuring and demoralizing the business of plaintiff and its agents.

Furthermore, we submit that the trading stamp cases and the ticket scalper cases, so-called, together with the general principles of equitable jurisdiction afford authority for enjoining the Defendants quite independent of the questions arising under the patents.

Sperry v. Mechanics Co. 128 Fed. 800.

Sperry v. Pommer, 109 Fed. 309.

Sperry v. Feuster, 219 Fed. 757.

Bitterman v. L. & N. Ry. Co. 207 U. S. 205.

Nashville Ry. Co. v. McConnell, 82 Fed. 52.

Illinois Central v. Caffrey, 128 Fed. 77.

RECENT DECISIONS INTERPRETING THIS CONTRACT.

In the unreported case of Ford Motor Co. v. Fred Buck, in the United States District Court for the Northern District of Illinois the facts were almost identical with those in the case at bar. The same contract was involved and upon a full hearing a perpetual injunction was granted. No opinion was filed but the following decree was entered:

THIS CAUSE duly came on to be heard at this term upon the bill, answer, replication, and proofs; and the Complainant appearing by **L. B. ROBERTSON**, Esquire, and **MARQUIS EATON**, Esquire, its solicitors, and the Defendants appearing by **A. A. Rolf,** Esquire, their solicitor, and the Court having heard the arguments of counsel and being fully advised in the premises,

And it appearing to the Court:

That Complainant, Ford Motor Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan and transacting business in said State of Michigan and divers other states and territories of the Union; that Complainant has duly complied with all the laws of the State of Illinois, pertaining to foreign corporations doing business in Illinois; that Complainant and Defendants, respectively, have places of business and are transacting business in the City of Chicago, in the Northern District of Illinois, Eastern Division, and that the amount in controversy between Complainant and Defendants exceeds the sum of Three Thousand Dollars;

And that for many years, to-wit, eleven (11) years last past, Complainant has been engaged in the manufacture and vending of automobiles and automobile parts, in particular manufacturing, and

vending the automobile known as "Ford" and incidental parts thereof;

And that Complainant has expended large sums of money in advertising its product under the name "Ford"; that as a result of such advertising and of the merit of Complainant's product the words "Ford," "Ford Motor Cars," and "Ford Cars" have come in the public mind to mean and to designate the automobiles so manufactured and vended by Complainant;

And that in the conduct of its business Complainant has made use of certain trade-marks among them a certain trade-mark known, to the trade and to the public, as the "Winged Pyramid," carrying in script the word "Ford"; and among them also the word "Ford" so written in script;

And that Complainant caused said trade-mark, word, and design to be duly copyrighted and registered under the laws of the United States and foreign countries; that Complainant has become and is entitled to the exclusive use and control of such trade-mark, word "Ford," and design in connection with the manufacture and sale of automobiles and automobile parts, and the right to control and limit the use thereof to such person or persons as in its discretion it desires to authorize to use the same;

And that in the conduct of its said business

Complainant appoints in divers States, Counties, Cities, and Towns throughout the United States certain corporations, firms and individuals to act as its agents in certain territory to arrange for the sale of its product, and pays to said corporations, firms and individuals, so appointed, as agents, certain commissions for their services; that in appointing such agents Complainant by contract consigns and allots certain territory to certain agents and that in said contracts said agents agree that they will not arrange for the sale of Complainant's product in the territory of any other agent so appointed by Complainant and will not arrange for the sale of Complainant's product in any territory not allotted to them in their respective contracts; that Complainant selects such persons to act as its agents as will carry out and observe the provisions of said contract and whom it may recommend to the public as reliable persons, not only in arranging for the sale of Complainant's product but also in the giving of proper service in the up-keep thereof;

And that agents of Complainant are required and do conspicuously display signs, designating that they are agents for "Ford Cars"; that as a result of the large amount of business transacted by the Complainant and the merit of its product and its extensive advertising, certain phrases and expressions have come to mean, to the trade and to the public, that the person making use of such word, phrases and expressions is an authorized agent of

Complainant; that among such words, phrases, and expressions, are the following:

The use on windows of the word "Ford."

The use on windows of the word "Ford" in dress and style imitative or resembling the trade-mark of Complainant above referred to.

The use on business cards and letter-heads of the word "Ford," of the words "Ford Cars," or the words "Ford Distributors."

And that Defendant, Fred Buck, is the owner and proprietor of a garage located in Chicago, Illinois, at, to-wit, Barry Avenue and North Clark Street, known and operated as "Barry Sales Co."; that said designation, Barry Sales Co., is but a name and style under which said Defendant, Fred Buck, carries on a general automobile business;

And that neither Fred Buck, doing business under the name and style of Barry Sales Co., or Fred Buck individually, are authorized by Complainant to be its agent for the territory in which said place of business is located or in any other territory;

And that the Defendant, Fred Buck, doing business under the name and style of Barry Sales Co., and the Defendant, Fred Buck, individually, al-

though well knowing the business system, trade-marks and the rights therein of the Complainant, have made use of the word "Ford," the words "Ford cars," the words "Ford distributors" and other similar words and phrases, and have imitated the dress and style of Complainant's trade-mark above mentioned, in various manners and at various times up to the filing of the Bill of Complaint herein, for the purpose of diverting Complainant's trade from Complainant and its duly authorized agents to said Defendants by leading the trade and the public, particularly prospective purchasers of "Ford automobiles," to believe that the Defendants were agents authorized by Complainant to arrange for the sale of "Ford automobiles,' and of leading such prospective purchasers into the supposition that such prospective purchasers would be entitled to receive from said Defendants all the benefits which are provided by Complainant and its authorized agents to users of "Ford automobiles," and have threatened so to do, all to the benefit of said Defendants and the irreparable injury of the Complainant; and that each and all of the allegations of the said Bill of Complaint are true.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant, Fred Buck, doing business under the firm name and style of Barry Sales Co., and Fred Buck, individually, their agents, attorneys, servants, and employes

be, and they are hereby, perpetually restrained and enjoined from:

1. Making, advertising, or circulating any statement or representation to the effect that Defendants are agents for the sale of Ford cars in Chicago, Illinois, or elsewhere.

2. Using on any window, sign, business card, letter-head, or using in any other manner whatsoever, the word "Ford" in dress and style imitative of Complainant's trade-mark.

3. Employing any sign, banner or other device bearing or containing the words "Ford," "Ford cars," "Ford distributors," or other combination of the word "Ford" with other words or expressions implying that Defendants are authorized agents to handle Ford cars.

4. Representing indicating, or implying that Defendants have any relations or dealings with the Complainant's factory at Detroit or with the Chicago branch of Complainant's business or with any other branch of Complainant's business in any other city of the United States.

5. Acquiring a secret or undisclosed interest in any authorized agency of Complainant to arrange for the sale of Ford cars and from

inducing or attempting to induce any authorized agent of Complainant to arrange for the sale of Ford cars in violation of any of the terms of the contract of such agent with Complainant, and from inducing or attempting to induce any authorized agent of Complainant to breach his or its contract of agency with Complainant in any particular.

AND IT IS FURTHER ORDERED that Complainant do have and recover from Defendants its costs and disbursements in this suit to be taxed by the Clerk in due course and that a writ of execution issue therefor.

November Term, A. D. 1914.

December 3rd, 1914.

ENTER KENESAW M. LANDIS,

Judge.

We submit that this is based upon a correct interpretation of the law pertaining to the right of Plaintiff to control the use of its name and trademark, as well as the sale and distribution of its cars.

In Orebaugh v. Neu,..........Ohio,..........., involving also the construction of this contract, a general demurrer was interposed and the Court states:

> "The question raised is, whether or not this contract between Orebaugh and the Ford Motor Co. is against public policy, monopolistic in its tendencies, and in violation of the Sherman anti-trust law."

After a careful consideration of the provisions of the contract, the Court said:

> "Having concluded this part of the questions that are made in this case and finding that the contract is a valid one, is not against public policy, is not monopolistic, and is not within the provisions of the Sherman anti-trust law, and that the patentee of these articles was discharging only his own legal rights protected by the patents, we now come to the question of liability of the defendant" * * *

In Coleman v. Ford Motor Company,........... S. W..............., in considering a previous contract of this company containing substantially the same provisions as the present contract, the right of plaintiff to govern the sale and distribution of its cars under the terms of the contract as well during the life, as after its termination, is fully sustained.

As has been said, plaintiff believes that it is for its best interest to vend direct to the ultimate consumer through the medium of agents rather

than sell outright to dealers who may vend to the ultimate consumer on such conditions as the dealer may select, depriving the consuming public of that uniformity of treatment, which, amongst other things, contributes so highly to the popularity of plaintiff's automobiles.

It is a matter of common knowledge that plaintiff's product has a very wide distribution, and sells readily in response to a wide public demand. To act as an intermediary in the distribution of such a product, and thereby earn commissions, is a representation which naturally would be eagerly sought for, and to secure it agents may well and profitably submit to onerous conditions that might not be worth while in connection with a less popular product. Such a motive is sufficient to account for the willingness of an agent to agree to the requirement of an 85 per cent advance. He could even profitably advance to the manufacturer the full retail list price and all carrying charges and yet be well compensated when his commissions were paid to him.

V.

THE RECORD CONTAINS ONLY THE CONTRACT.

Bearing in mind that there is no syllable in this record impugning the good faith of the Ford Motor

Company and its agents in making the contract under consideration, no valid reason exists why the contract should be interpreted otherwise than by the usual tests, or why it should not be construed in accordance with the usual and ordinary meaning of the language employed.

There is not even an ambiguity to which to attribute a doubt as to the intentions of the parties. To attribute to the parties some intention not to be found in the language employed is to disregard the contract actually made and clearly expressed, and attribute to the parties something not shown to have been even thought of, much less intended.

And why? The question can only be answered on the theory that, for some reason not disclosed by the record, the Court has arrived at the conclusion that the parties intended to violate the law, and hence by reasoning backward it is concluded that the parties did not intend those results which alone can follow from the language of their written contract, but something sinister, some evasion, some device to conceal the real transactions, and therefore that what the parties called a consignment was actually a sale.

Having thus travelled in a circle to find a premise the conclusion could easily be drawn that the Serman law was violated and that the attempt by the Ford Motor Company to fix the price at

which the automobiles made by it should be sold was beyond its right.

VI.

THE PRINCIPAL HAS THE RIGHT TO CONTROL ITS SALES AGENTS.

But a wide difference exists between the attempt by a patentee to project its control over prices to future sales after it has exercised the right to vend secured by the patent laws, and the power of a patentee to fix the prices at which its sales agents shall sell and to prescribe the territory within which the agent may act. This distinction is clearly apparent to the Court in the case of **Waltham Watch Co. v. Keene, 202 Fed. 225, 240:**

> "In the case of D. E. Virtue and Owatonna Fanning Mill Co. v. Creamery Package Mfg. Co. et al., 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. ...., decided by the Supreme Court of the United States, January 20, 1913, the Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, and in April, 1897, it created the Creamery Package Manufacturing Company, its sales agent of them, the latter not manufacturing, which the Court held it had the right to do, and that in so doing it had the right to fix the prices at which its

sales agent should sell and the territory in which it should sell, and even the purpose for which it should sell.

"The Court said:

> 'It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights; but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using, and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in Standard Sanitary Manufacturing Co. v. United States, ante. But patents are not so used when the rights conferred upon them by law are only exercised.'

"The case just cited has nothing to do with restrictions, license agreements, or contracts attempting to fix the prices of such articles on re-sales when the sole right of vending has once been exercised by the sales agent. As stated, an exclusive sales agent of the manufacturer under a patent is but exer-

> cising the sole right to vend expressly conferred by the patent statute."

Cole Motor Car Co. v. Hurst, 228 F. 280 (C. C. A.), was a case where, as in the case at bar, the lower court held contracts to be "sales" and hence in conflict with the anti-trust laws, and the Circuit Court of Appeals, on an analysis of the terms and conditions of the contract, reversed the case and held the contracts to be consignments and not in restraint of trade.

Hurst was designated as "distributor." He had to remit in full for all sales and the Company sent check weekly for commissions due. If a sale, Hurst would have held out his commission. The distributor was bound to insure in the name of Company. This presupposes an insurable interest and title in the Company. There were provisions for cancellation of the contract and return of unsold cars. No conditions were attached to the Company's right to take back machines whenever it chose to do so. The Company retained unqualified rights of dominion and control which were inconsistent with the theory that the transactions were sales.

Not only was the contract not contrary to anti-trust laws, but the Court said:

> "On the contrary, its effect is to foster the trade of the Plaintiff Company, and to

> enhance its business to make secure its returns. This sort of arrangement is not obnoxious to the law. (Phillips v. Cement Co. 125 F. 593.)
>
> "It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices."

No amount of care or thought could devise a contract that would more clearly express an intention to create the relationship of principal and agent between the Ford Motor Company and its agents and provide for consignment of automobiles to such agents, retaining to the Ford Motor Company absolute control over the agents and their dealings as such representatives, than the contract now under review.

As was said in the last quotation:

> "Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices."

And why should not the same rule and reason apply if we substitute for the words "Cole Company" the words "Ford Motor Company"?

We submit that language precisely applicable to the case at bar was used in the case of Sturm v. Boker, 150 U. S. 323, 37 L. ed. 1093-9:

> "It is too clear for discussion, or the citation of authorities, that the contract was not a sale of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consignment' employed in the letters were used in their commercial sense, which meant that the property was committed of entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other."

Again,

> "The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *

> "The agency to sell and return the proceeds, or the specific goods if not sold, stands

> upon precisely the same footing, and does not involve a change of title."

The case of Harris v. Coe, 71 Conn. 163, 41 Atl. 554, involved the construction of an oral contract concerning which evidence had been received in the trial court. The Supreme Court said:

> "Was the contract in question one of sale or bailment? What the terms of the agreement entered into by the parties were, is a question of fact, upon which the decision of the trial court is final. What the legal effect of the provisions of the contract is, is a question of law, which may be reviewed on appeal."

And after reviewing the evidence and pointing out the good faith of the parties and concluding that the transactions showed a consignment for sale, the Court said:

> "A consignment of goods for sale is ordinarily a bailment. The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor."

It will be seen that we are engaged in arguing in behalf of a contract which not only has every legal intendment in its favor, but is based upon

sound business judgment and experience, and is effective to produce proper and desirable results. Because the effect of such a contract generally applied to all the representatives of the plaintiff, and governing the distribution of its entire product of automobiles, is to enable the plaintiff to fix a uniform price at which all its automobiles shall be purchased by the ultimate consumer, does not create such a restraint of trade as to be violative of the Sherman law, and yet we can only explain the decision of the District Court in this case on the basis that the Court first assumed that any arrangement under which a uniform price to the consumer is fixed is violative of the Sherman law, and that a premise must be found from which to deduce that conclusion, and the assumption that the transaction was a sale and not a bailment afforded the necessary premise. But a uniform price is not wrong in itself nor is it conclusive that there is a violation of the Sherman Act.

VII.

RECENT LEGISLATION BY CONGRESS MATERIALLY AFFECTS THE RULES OF PUBLIC POLICY APPLICABLE TO PRICE MAINTENANCE CONTRACTS.

Congress, since the decision in the Miles case and the Sanatogen case, has made some most important pronouncements on the subject under discussion in

those cases—pronouncements having an important bearing upon the so-called "Public policy as to uniform prices."

Section 2 of the Clayton Act (effective October 15, 1914) condemns discrimination in prices between customers on the same commodity as unlawful, when employed to substantially lessen competition or create a monopoly.

This is a most decided declaration of Congress upholding the virtue of uniform prices and condemning the practice of making different prices to different people for the same article.

Section 5 of the Federal Trade Commission Act (approved September 26, 1914) declares to be unlawful "unfair methods of competition."

Thus we have at the same session of Congress two important declarations affecting the public policy of the United States on this subject—one upholding the policy of uniform prices and the other condemning certain forms of competition.

Time was when any and all forms of competition were regarded as highly virtuous and worthy of encouragement by the Court.

But these declarations point out clearly that the thing to be condemned is monopoly, whether produced by competition or combination.

Fundamentally this is the true and only inquiry: Do the acts in question tend substantially to bring monopoly? What then is monopoly? What constitutes such a monopoly as to be subject to condemnation by the courts? Do the acts under investigation tend substantially to bring about such a monopoly?

We submit no public good demands competition in a single article of manufacture of a single maker, where there are large numbers of manufacturers in the same line, and when there is abundant active competition in that line.

If uniformity of prices on the same article is desirable, then any system of a manufacturer designed to bring about such uniformity to the public should be favorably construed to effectuate such object, and should never be condemned unless plainly in itself illegal, that is mala in se.

A CONTRACT PRESUMED TO BE LAWFUL UNLESS THE FACTS CLEARLY INDICATE OTHERWISE.

In thus reasoning, the Court overlooked well settled cardinal principles essential to the proper construction of contracts. It is our contention that the contract under consideration contemplated a normal, a proper, and customary relation between

principal and agent, and we submit to the Court that:

> "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940.

> "But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

VIII.

FACTS OF THE CASE LIMITED TO THE CONTRACT ITSELF.

There are no "established facts" in this case,

except the complaint, and the contract itself, and the motion to dismiss, admitting the truth of the allegations of the complaint.

In Bigelow v. Calumet & Hecla Mining Co., 167 Fed., at page 728, the Circuit Court of Appeals said:

> "But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created."

And further:

> "The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.
>
> "In **Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179-184, 50 L. ed. 428,** it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful re-

> sult under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.'"

The contract between plaintiff and its agent is clear and definite in language and precise in its use of terms, and no word can be found therein which even squints at a sale.

In fact the entire argument on which is based the conclusion that the legal effect of the contract is a sale to the agent begins and ends with Condition 10 of the contract (Transcript, p. 21) which provides that the agent shall advance to the company 85 per cent of the list price of the automobiles to be consigned to him and receive 15 per cent as his commission. The inconclusiveness of this reasoning to contradict the plain language of the contract or to impeach the good faith of the parties is apparent. It is a case of basing an inference on an inference and drawing thence a conclusion, a form of argument not to be tolerated in legal proceedings.

We find pertinent in this connection another quotation from **Hobbs v. McLean**, from which we have just quoted:

> "This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can

> be held to effect a transfer of Peck's contract with the United States and to be a violation of the statute."

The relation of the Ford Motor Company and its agent is that of bailor and bailee for mutual benefit, the subject of the bailment being the consignment of automobiles, and the object the employment to negotiate for sales by the bailor of its property. The relation might well be termed that of principal and factor—a relation long regarded as beneficial in the transaction of business, and one whose legal effect has been defined by numerous decisions. The property consigned is bailed and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of consignment.

The Ford Motor Company and its agents have the right to select the conditions under which they will contract, no matter how onerous those conditions may seem to others.

IX.

IF THE AGENCY CONTRACT BE IGNORED AND A SALE CONTRACT BE CONSTRUCTED BY THE COURT, IT WAS AT LEAST A SALE SUBJECT TO CONDITIONS.

SALES SUBJECT TO CONDITIONS ARE VALID.

We have thus far discussed the contract as it reads, and as the parties made it, and as we contend it should be considered, there being nothing in the record on which to impeach its good faith or question its terms as expressing the actual relationship between the parties.

The District Court not only held the transaction to be a sale, but further held that the Sherman Act was violated and that, therefore, the plaintiff was not entitled to the relief prayed for, or any relief.

It is our position that the contract in question is what it purports to be, an agency and consignment contract, and that the Sherman Act has no application to the the transactios disclosed by the record in this case, but we are prepared to go further and contend that even though it be conceded for the purpose of argument that the contract is capable of being interpreted as provided for sales whereby the agent acquired the full and complete ownership of the automobiles consigned to him, yet, that nevertheless the Sherman law was not violated. Unless the court is prepared to eliminate the contract in its entirety and itself construct for the parties a new contract out of the tenth condition of the actual contract, the transaction was at least a sale subject to

conditions which must be complied with by the purchaser and which can be enforced against him.

X.

THE CONTRACT CONCERNED A PATENT PRODUCT.

It appears from the record that Ford automobiles are manufactured under numerous Letters Patent of the United States and these patents are enumerated in the contract which is made a part of the complaint. (Transcript—pages 4 and 27.)

As a prelinminary it may be well to remind ourselves that a patentee is granted by the law broad and exclusive rights. He may make, sell, or use, or not as he will. He may grant to others these rights or any of them, or any part of them, and impose conditions on the exercise of the rights granted.

All discussion of this proposition has led to but one conclusion, as stated in **Paper Bag Patent Case 210 U. S. 424, 52 L. ed. 1122.**

> "It shows that, whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. 'And, for his exclusive enjoyment of it during that time, the public

> faith is pledged.' Chief Justice Marshall in Grant v. Raymond, 6 Pet. 242-3."

And again in **Bement & Sons** vs. **National Harrow Company, 186 U. S. 70, 46, L. ed. 1059**, the Supreme Coure said:

* * * * *

> "Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

The right of the patentee to sell the patented article **subject to conditions prescribed by contract between the patentee and the vendee** has been recognized by numerous decisions of the Supreme Court, and restrictions thus created are within the rights secured to the patentee by the patent laws and not obnoxious to the Sherman law.

In the case of **Keeler v. Standard Folding Bed Co., 157 U. S. 657, 39 L. ed.** 848, the Court said:

> "When the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, **unless restrained by contract** with the patentee, can sell and dispose of the same."

After discussing several prior decisions as to the rights of patentee the Court further said:

> "The scope and effect of those decisions were thus expressed by Mr. Justice Clifford, in **Mitchell v. Hawley, 83 U. S., 16 Wall. 547 (21 L. ed. 323.)**:
>
> Patentees acquire by their letters patent the exclusive right to make and use their patented invention and to vend to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee when he has himself constructed a

> machine and sold it **without any conditions,** . . . . and the consideration has been paid to him . . . must be understood to have parted to that extent with all his exclusive right.' "

In the preceding and following quotations the black face letters are ours and call attention to the recognition by the courts of the distinction we make that it is only a sale **without condition** or **restriction** that passes the patented article out from under the monopoly which the law secures to the patentee.

In the Dick case, (224 U. S. 1) the Court said:

> "By sale of a patented article **subject to no conditions,** the purchaser undeniably acquires the right to use the article for all the purposes of the patent, so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. . . . . By such an **unconditional** sale of the thing patented it is said to be 'no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'

In the cases cited above, as well as in the leading case of **Bloomer v. McQuewan,**

14 How. 539, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought **unconditionally**; that is, **subject to no specified limitation** upon his right of use."

And further:

"An **absolute and unconditional** sale operates to pass the patented thing outside the boundaries of the patent, ... The rule and its reason is thus stated in **Robinson on Patents, Vol. 2, §824**:

'The sale must furthermore be unconditional. Not only may the patentee impose **conditions limiting** the use of the patented article, upon his grantees and express licensees, but any person having the right to sell may, at the time of sale, **restrict** the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale.' "

Further:

"We repeat. The property right to a patented machine may pass to a purchaser with

> no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional."

And in the same case the Court said:

> "Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In **E. Bement & Sons v. National Har-**

row Co. 186 U. S. 70, 89-92, 46 L. ed. 1058, 1068, 1069, 22 Sup. Ct. Rep. 747, this court quoted with approval the language of Chief Justice Marshall in Grant v. Raymond, 6 Pet. 218, 241, 8 L. ed. 376, 384. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

'"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and it is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged.'"

And further, in discussing the prior case of E. Bement & Sons against National Harrow Company, 186 U. S. 70, the Court said:

"In E. Bement & Sons there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combinations and contracts were obnoxious to the Sherman Act; but, upon the other side it was said that as the contract concerned only the sale of patented articles, that the act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the **Button Fastener Case, 77 Fed. 288**, as follows:

" 'If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit other to use it, he has but surpressed his own.' "

* * * * *

"In that case the question was not one of

infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman Law, although the agreement covered only patented articles. The Court, after referring to the exceptions to the patentee's monopoly resulting from conflict with the police power of the state, said:

"'Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.'

"Now if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use, made by the patentee, the only possible defense would be that the agreement was one contrary to public policy, in that it affected freedom in the sale of such articles

to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the Bement Case. The court in that case found that the contracts did include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act (26 Stat. at L. 209, chap. 647, U. S. Com. Stat. 1901, p. 3200) said:

" 'But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.'

"As to whether the restrictions upon sales imposed by the agreements were 'legal and reasonable conditions', the court said:

" 'The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold but that was only rec-

ognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.'

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any reasonable stipulation, not inherently violative of some substantative law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.

* * * * *

"The provision in regard to the price at which the licensor would sell the article manufactured under license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and pro-

> viding for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In the Bement Case it is held that a license to make and sell can be burdened with restrictions on the price at which the licensee can sell.

After such licensee has paid the cost of manufacture and the royalty to the patentee it is impossible to distinguish his position and title as to the product from that of one who has acquired the patented article from the patentee by paying a price which includes the same elements and is substantially the same as that paid by a licensee, that is to say, the cost of manufacture and a compensation to the patentee based on his ownership of the patent.

And, as was said in the Bement Case,

> "The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the

> owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

That we have stated the correct rule is borne out by the interpretation put on the Sanatogen and Bobbs Merrill decisions in some recent cases.

In American Graphophone Co. v. Boston Store, 225 Fed. 785, the Court in quoting from those decisions pointed out that in those cases there was no question of **contract** but only of attempt to fix prices by **printed notices,** and concluded:

> "That an agent or vendee of a patentee may, by **direct covenant or agreement,** be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised."

And in discussing the Bement Case, which settles the rights to impose price restriction on a licensee to make and sell, the Court said:

> "The covenant for price restriction in the Bement and other cases refered to, although

> found in a license to manufacture and sell, was germane to the patentee's exclusive right of sale. . . . . It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article."

The opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of **Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 359,** is full and convincing.

In that case the arrangement by which the patentee sought to maintain prices, was attacked as in violation of the Sherman Act.

The Court, in the course of its opinion, said:

> "Under its constitutional right to regulate interstate commerce Congress made illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states,' and subjected to liability to fine or imprisonment 'every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states.' Congress, having created the patent law, had the

right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subject of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. **Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.**

* * * * *

"The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

* * * * *

"None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right."

XI.

A PRINCIPAL MAY LAWFULLY CONTROL ITS AGENTS. COMPETITION NOT AFFECTED THEREBY.

It should be borne in mind that the case at bar is not one where rival manufacturers of competing products seek to eliminate competition in the sale of their products, but concerns only the marketing of one independent product actively competing with scores of other automobiles of equal or greater attractiveness. The distinction is pointed out in the case of **Blount Manufacturing Co. v. Yale & Towne Manufacturing Co. 166 Fed. 555,** where owners of competing patents entered into an agreement for the elimination of competition and the pooling of profits. The Court said of that:

> "A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefit of competition, and creates a restraint of trade."

But, the Court also uses language which seems to us to cover all that plaintiff could be charged with having done in its attempt to regulate the prices at which its product should be sold:

> "It seems self-evident that a contract

> which is only coextensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices."

Assuming that the contract in the case at bar was a contract whereby the patentee sought to regulate the prices at which the patented article should be sold, we contend that such a contract is only coextensive with the monopoly to which the patentee is by law entitled. The contract does not restrain trade beyond the life of the patent, or create any additional restraint of trade beyond the privilege which the patentee unquestionably has to vend the patented article or refrain therefrom and refuse to the public the use of it.

As was said by the Supreme Court in **Virtue v. Creamery Package Mfg. Co. 227 U. S. 32, 57 L. ed.** 393, 404:

> "The owner of a patent has exclusive rights,—rights of making, using, and selling. He may keep them or transfer them to another,—keep some of them and transfer others. This is elementary; and, keeping it in

mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we stated in **Standard Sanitary Mfg. Co. v. U. S. 266 U. S. 20, 57 L. ed. 107. But patents are not** so used when the rights conferred upon them by law are only exercised. The agreement of the 19th of April, 1897, constituted, as we said, the Creamery P. M. Co. a sales agent of the churns and butter workers and fixed their list price."

And after further discussing the contracts alleged to be in restraint of trade, the Court said:

"The Owatonna Company **did nothing more in its contract** with the Creamery Package Mfg. Co. **than to make that Company its exclusive sales agent, and this was no violation of law.** . . . . . . But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale, is not one condemned by law."

In the Dick Case the Court further used this pertinent language:

"The market for the sale of such articles to the users of his machine, which, by such

a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others, and in no wise restricted their legitimate market."

Suppose the Ford Company had itself rented stores or garages in each of the towns where it desired to have its automobiles sold and put in charge there of its employes, and secured by borrowing from local banks the money it might need, pledging as security therefor the automobiles shipped to the local garage, certainly no question would or could be raised as to its right to instruct those employes as to their duties, including the prices at which they could sell automobiles. Here certainly would be no restraint of trade.

And the situation is legally in no way different where the Ford Motor Company selects and appoints a local man as an agent and consigns automobiles to him to find buyers therefor to whom it can sell, and requires that agent to maintain a garage and shop for giving service to Ford owners and recieves from that agent by way of advances against consignments of automobiles such sums of money as may be agreed upon.

Such an agent is no less under the direction and control of the Ford Motor Company than an employee sent out from the factory. The principal is certainly not prohibited by any rule of law from dictating the prices at which its automobiles shall be sold by its agents, nor is the situation altered by the fact that there are hundreds of similar agents all governed by identical contracts.

By the contract shown in this record the relationship created is that of principal and agent and if the contract is interpreted by the usual canons of interpretation, no other meaning can be found in it.

Nothing in this record justifies the suspicion of an attempt to evade any law. The fact that the Ford Motor Company is a very large concern, that its production of automobiles is enormous, that its agents are very many, surely is not yet a violation of law.

> "There is no limit in this country to the extent to which a business may grow."

> **United States v. Eastman Kodak Co. 226 Fed. 80.**

> **United States v. International Harvester Co. 214 Fed. 1000.**

We respectfully submit that the conclusion of the District Court that the Sherman law is violated by the contract under consideration can only be explained by the mere bigness of the transactions involved. Having arrived at the conclusion that the Sherman law was violated, a premise could be found for that conclusion only by holding that there was no agency or consignment but rather a sale by the pretended principal to the alleged agent and hence a mere device to evade the Sherman law.

It would have been interesting if we had been given the process by which the Court thus reasoned in a circle.

XII.

RESTRICTED OR CONDITIONAL SALES.

But the premise is not sufficient to support the conclusion.

The agent, if he be held a buyer, did not buy for use but only for resale, and the transaction was a sale subject to restrictions, not an unconditional sale, and no appellate court has yet denied the patentee the right **by contract** to impose conditions on the disposition that a purchaser for resale and not for his own use may make of the patented article. The right to refuse to sell at all is beyond question, and that right includes the right to make any kind

of a partial or restricted sale that may be agreed on.

The market for Ford automobiles was one created by the Ford Motor Company and as the Supreme Court said in the Dick Case in the last quotation just made:

> "was a market which he alone created by the making and selling of a new invention."

And again:

> "By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market."

And in further discussing this right of a patentee to sell or refuse to sell, the Court further said in the Dick case:

> "This was pointed out in the Paper Bag Case, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent be-

cause it secures a monopoly to make, to sell, and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries required to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands, it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

"The conclusion we reach is that there is

no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee.

* * * * *

"Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit, delivered by Judge (now Mr. Justice) Van Devanter in National Phonograph Co. v. Schlegel, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said:

'An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the

sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer.' "

National Phonograph Co. v. Schlegel, 128 F. 733, from the opinion in which the Supreme Court took the quotation above repeated, and gave to it the stamp of its approval, was a case where a contract was entered into binding a purchaser not to resell for less than certain named prices, or to any other dealer who did not sign a contract, and **it was held that such contract was valid and enforcible** in a suit to restrain future violations of the contract.

The Ford Motor Company is given by law a monopoly under its patent enumerated in the contract in question. It is entitled to refrain from making, or vending, or using the patented article, and it is entitled to prescribe the con-

ditions under which it will permit others to make, sell or use, and no steps which it may take to protect those rights can be obnoxious to the Sherman law.

Granted that it is true as was said by the District Court in the case at bar:

> "Now, this contract is adroitly drawn, no question about that, and it attempts to control, not only the price at which agents or sub-agents of the company shall sell automobiles, but the persons to whom they shall sell them, and the territory in which they shall be sold."

We submit that the entire pith of this statement lies in its use of the word "adroitly."

But even if we assume, again without warrant of any proof or allegation in this record, that there was an attempt on the part of the Ford Motor Company to be "adroit," yet it is sufficient comment on the result to quote again from the Dick Case:

> "And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the

duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial."

XIII.

DISTINCTION BETWEEN RIGHT TO CONTROL SALES AND PRICES BY CONTRACT AND ATTEMPT TO DO SO BY NOTICE.

We pass now to the distinction apparent in the leading cases between what may be done by a contract between parties in privity and what cannot be done by attaching a notice to an article sold. This distinction is apparent in many of the cases we have hereinbefore discussed and we have been at some pains to call attention to it.

THE SANATOGEN AND MILES MEDICAL COMPANY CASES DISTINGUISHED.

Of the two cases cited, in the opinion of the District Court, one,—the case of **Dr. Miles Medical Company v. John D. Park & Sons, 220 U. S. 373,**—did not involve patented articles, or rights under the patent law. The other case,—**Bauer v. O'Donnel, 229 U. S. 1-10, 57 L. ed. 1041-3,**—contains no mention

of the Sherman Act and was a suit to restrain the alleged infringement of a patent by a retail dealer in selling at a price less than that marked on the package.

In the Miles Medical Company Case the articles sold were made under a secret process but not protected by any letters patent. In that case the Court said in this connection:

> "First. The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensees should sell. The court said, referring to the act of July 2, 1890 (p. 92): 'But that statute **clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed** upon the assignee or licensee of a patent by the owner thereof, **restricting the**

terms upon which the article may be used and the **price to be demanded therefor.** Such a construction of the act we have no doubt was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution.
* * * * *

"The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and **the extent of the right which that law secures is not here involved or determined."**

(Black-face type ours.)

Packages of "Sanatogen" were marked with a notice that they were not to be sold by retailers at less than $1.00 per, and infringement of the patent was charged against a retailer who sold for less.

All that was decided was that there had been no infringement, and that Sherman law was not involved.

The Court in the course of its decision said:

> "The patentee relies **solely** upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were **neither the agents nor the licensees of the patentee.**"
>
> (Black-face type ours.)

It was held that the holder of the patent could not thus control the price. Where purchase was made from one who had full title and right of disposition it passed free from price restriction.

There was no question there, as in our case, of violation of contract, or of the relation of principal and agent.

It will be noted by the quotation that the Court carefully discriminates from a situation where the vendor is **an agent** of the patentee imposing the price restriction, and hence the case not only is not an authority for the respondents, but inferentially supports our contention that a patentee can, by proper contract, make a sale on condition, or create an agency for future sale, and retain the right to fix the price at which the user may buy, and bring the patentee and buyer into immediate relationship of vendor and vendee through an agent selected by the vendor.

There was no question in the "Sanatogen" Case of the violation by the retailer of a direct contract with the holder of the patent and the case did not decide that the holder of the patent could not contract directly with the retailer as to the price at which the patented article should be sold to a user.

That case did not hold it illegal to attempt to fix the re-sale prices of the patented articles—but only that the attempt in that instancee was not successful because it was a mere notice, not binding on strangers under the circumstances.

That case did not pretend to overrule numerous prior cases holding that it is entirely competent and proper to establish a monopoly in a patented article. It only said that it could not be done by a notice.

That case did not attempt to revolutionize and overturn the law giving the patentee the exclusive right to vend the article. It merely said that in that case he had exhausted his right to vend when he sold at his full price, and that a mere notice did not qualify or restrict the title thus sold.

Note the important distinction. In the Dr. Miles Case the Court held it was illegal and unlawful to attempt to control re-sale prices of patented articles becausee contrary to the anti-monopoly laws.

But in the Sanatogen Case the Court did not hold that it was illegal or unlawful to control re-sale prices of patented articles, but only that the particular plan was not effective.

It has always been lawful to monopolize a patented article. "Its very nature is that of a monopoly" says the Bement Case.

The Sanatogen Case was a suit against subvendees to compel them to obey a notice, which notice was in distinct opposition to the title vended. This is a case to compel respect for signed contracts, contracts absolutely lawful in themselves.

OTHER CASES DISTINGUISHED.

Standard Sanitary Mfg. Co. v. U. S. 226 U. S. 20-49, 57 L. ed. 107.

Was a suit by the Government to enjoin violation of the Sherman Act. There was a combination of a large number of manufacturers and several patents and a combination to control trade contrary to the Sherman law.

The fact that patent rights were held by some or all of the defendants was held not enough to enable the defendants to escape the law.

Even where the question of patent monopoly is involved, however, a system of uniform trade agreements based upon the use of a patented invention which transcends what is necessary to protect such monopoly, and which practically controls the output and dictates the prices from producer to consumer on nearly **all sales of sanitary enameled iron-ware** throughout the country as illegal and void. This was an attempt under cover of patent rights to control trade on articles **not covered by any patents.**

In Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, suit was brought to restrain the sale of a copyrighted book at retail at less than $1.00 for each copy, basing it on a printed notice in the book.

As the Court said:

> "The facts disclose a sale of a book at wholesale by the owners of the copyright,at a satisfactory price, and this **without agreement** between the parties to such sale obligating the purchaser to control future sales, and where the alleged right springs from the copyright law alone. * * * * *
>
> "In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who **made no agreement** as to the control of

future sales of the book, and took upon themselves no **obligation to enforce the notice** printed in the book. * * * * *

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, **with whom there is no privity of contract.**"

(Black-face type ours.)

The decision in the Bobbs-Merrill Case, as well as in the Sanatogen Case, was grounded solely upon the principle that the owner of a patent or copyright cannot qualify the title passed by means of a **mere notice attached to the chattel,** so as to restrict third persons in the sale of such articles.

In the case of **Straus v. American Publishing Company (231 U. S. 222, 58 L. ed. 192)** there was a combination of seventy-five (75%) per cent of the publishers and a majority of the booksellers in the United States united in an agreement not to sell copyrighted books originally uncopyrighted as well to dealers who would not maintain prices and it was held that where a copyrighted book had been sold and passed out from under the monopoly per-

mitted by law, the price could not be kept up by **printed notices** of retail price **attached to the book.**

In the case of **Victor Talking Machine Co. v. Strauss, 230 Fed. 449,** the Circuit Court of Appeals followed the Dick, rather than the Bobbs-Merrill and Sanatogen cases, and held that the plaintiff was entitled to the relief prayed for by its bill, and could maintain prices by a notice attached to the machine. This case has recently been reversed by the Supreme Court of the United States in an opinion not yet printed, and which at this time it is not possible to discuss, but it is to be assumed from the way in which the Supreme Court has regarded these questions in the Sanatogen, Bobbs-Merrill and other recent cases that the reversal was based upon the distinctsion, which we are urging in this case, between rights protected by direct contract and the attempt to restrict the ultimate purchaser by a **mere notice attached** to the machine.

In the case at bar, we are not attempting to claim anything by reason of any notice, but only to maintain the integrity of a contract as between the parties thereto.

We think we have quoted enough of the language of the courts to make plain our proposition that a patented article does not pass out from under the monopoly unless a sale or transfer has been **unconditional** and **unrestricted,** and by no possible

manner of interpretation can there be any escape from the numerous conditions under which the Ford Motor Company consigned automobiles to its agents.

We may then sum up this branch of the argument by saying, **FIRST,** that under the contract, whether construed as an agency contract or sale, the automobiles had not passed out from under the monopoly of the patentee; and **SECOND,** that, while it could be conceded that parties competent to contract may make any contract which they see fit, no Appellate Court has yet held that the Sherman Act was violated by a **contract** between the patentee and his vendee restricting the price at which the patented article may be sold, or the conditions under which it may be used, or the territory within which it may be sold.

In the Sanatogen Case, which related to a patented article, it was held that the holder of the patent could not project his control forward to a subsequent purchaser by **notice** printed on the package, but there was not in that case any question of the violation of a **contract** or of the prohibition of the Sherman law.

In the **Miles Medical Company** Case the Court used this language:

"Nor can the manufacturer by **rule and**

> **notice** in the **absence of contract or statutory right**, even though the restriction be known to purchaser, fix prices for future sales."

> "Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, **but upon agreement.**"

The black-face in the quotations just made are ours, for the purpose of calling attention to the fact that the Court evidently recognized that **by contract** the patentee can project his control beyond his own **sales.**

This distinction has been recognized in cases of which United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725-731 is an example. There the Court called attention to the fact that Bobbs-Merrill Co. v. Straus and Bauer v. O'Donnell were infringement suits—the one under a copyright, and the other under a patent, and to that part of the decision in the Bobbs-Merrill Case where it was said that

> "There is no claim in this case of **contract** limitation, nor license **agreement** controlling the subsequent sale of the book."

In United States v. Keystone Watch Case Co. 218 Fed. 502-514 the Court said:

"The defendant company attempted to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a **direct agreement** with the jobber. As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose and as the owner of these patents the company **had the right to make a direct agreement** with the jobbers whereby a minimum price was fixed at which the jobber might sell."

XIV.

THE DECISIONS OF THE COURTS IN FRANCE, BELGIUM AND GERMANY ON THIS IDENTICAL QUESTION RECOGNIZE THE DIFFERENCE BETWEEN A CONTRACT REGULATING RE-SALE PRICES AND A MERE NOTICE ATTACHED TO THE ARTICLE; AND THEY UNIFORMLY HOLD THE CONTRACT BINDING, BUT THAT A MERE NOTICE IS INEFFECTIVE AND NOT BINDING.

See the cases collected in the publication recently issued by the Department of Commerce of the United States, Bureau of Corporations, entitled

"TRUST LAWS AND UNFAIR COMPETITION" issued by the Government Printing Office in 1916.

FRANCE:

"Agreements to maintain fixed resale prices are regarded in France as legal and binding. The merchant who cuts the resale price after entering into such an agreement is held to have committed an unlawful act, as well as an act of unfair competition, against those of his competitors who keep their agreements. Such agreements to maintain resale prices are binding only upon the parties to the agreement. The manufacturer or distributor, except as noted above, has no ground for action against a merchant who cuts prices if he has not entered into a contract to maintain it. The following cases will illustrate these principles:

* * * * *

"A dealer in perfumery entered into an agreement with the manufacturer not to sell nor allow to be sold the products at prices below those fixed as a minimum * * * The court sustained the right of the manufacturer to sell his goods subject to such conditions as he might impose upon the purchaser.

"The Society des Eaux minerales de Vittel distributed to the trade a circular, fixing prices * * * The Society brought suit against a certain Brunet for selling below the fixed price. It was proved that Brunet bought the bottles not from the plaintiff but from a dealer who had not imposed any obligation upon Brunet regarding a resale price. The Court refused to consider the notice on the label as binding upon dealers to maintain the price noted thereon, and accordingly held that since no contract existed between the parties Brunet was free to resell his goods at prices that suited him.

Trust Laws and Unfair Competition, p. 579-580, where are given the references to the cases.

BELGIUM:

"Defendant, a retailer, made a verbal contract with plaintiff, a manufacturer, not to sell his kind of little cigars below the price fixed by the latter and marked on the box. It was shown that defendants had broken this contract. The Court awarded damages to the plaintiff.

"Defendant sold some little cigars below the price marked on the box. The notice on

the box also stated that anyone not maintaining this price, or, while maintaining the price, depreciated the article by giving premiums, would be prosecuted. There was no contract between the parties to the suit or between the defendant and the distributor to maintain prices. The Court held that in reducing prices defendant had not committed an unfair act against the manufacturer.

"A retailer sold Pall Mall cigarettes at Antwerp and Brussels below the price indicated on the outside wrapper of the boxes. He had not entered into any contract to maintain prices. The Court decided, therefore, that he was not guilty of unfair competition against the manufacturer, holding that the right of the merchant to dispose of his goods as he sees fit is absolute if they have been legitimately procured, that the notice on the goods that they cannot be sold below a certain price does not impose upon them a condition which should be transmitted with them, and that, while the seller can bind the purchaser not to resell below a certain price, and this legal contract is obligatory for the one who makes it, it does not bind others than the contracting parties. The Court further held that the defendant had committed no unlawful act, since it was not alleged that by

conniving with certain purchasers he had obtained from them the goods at prices permitting him to resell at a profit below the fixed prices, causing them in his personal interest to break their contract with plaintiff, nor had he done anything to discredit the products.

"A similar action was brought against the defendant in the above case for selling the "Petit Larousse illustre" dictionary below the price fixed by the publishers. It was shown that the plaintiffs had refused to deliver their books to defendant, because he would not agree to maintain the price, and that in spite of this defendant had procured indirectly a large number of copies which he sold below the fixed price. The Court of Appeal did not consider how the defendant procured the books, but decided that he had not committed an act of unfair competition in cutting the resale prices, since he was not bound by any contract.

"An association of manufacturers of pharmaceutical products sought to maintain a fixed price by various tactics, such as refusing to deliver to dealers not parties to the agreement, or delivering to them only at the price fixed for sale to the public, so that it was impossible for them to make any profit. The Court held that while the manufacturer

or proprietor of a product is free to sell it at any price that he chooses or to refuse to sell it at all, and can also impose upon the purchaser the condition not to resell except at a fixed price, and concerted tactics of the defendant association were a restraint of the freedom of commerce and industry."

Trust Laws and Unfair Competition, pp. 592-593, where are cited the authorities quoted.

GERMANY:

"Contracts by which producers bind the persons to whom they sell not to resell at less than a fixed minimum price are considered legal in Germany and the breach of such contracts constitutes an act of unfair competition which affords a ground for injunction and the recovery of damages. * * *

"A retailer who was not bound by contract sold some goods below the retail price fixed by the factory. The factory brought suit under section 1 of the law of 1909 Sec. 826 of the Vicil Code on the ground that the defendant was cognizant that all of the customers of the factory were bound not to sell below a fixed price. The Court rejected this view and held that a factory cound not prohibit a third party with whom it had no contract from

selling its products at a lower price than the minimum which it had fixed, for the goods might have been secured from some middleman who was not bound by the party who bought the goods from the factory."

The Court said in part:

" 'In any case we cannot agree with plaintiff that an act repugnant to good morals is involved merely in the reselling of the goods for less than the price imposed by the plaintiff upon his customers. The defendant has the right to sell the goods, which he has procured in an honest way, at any price satisfactory to him. If he is to act in a manner contrary to good morals, an element of unfairness must be involved, such as causing the party from whom the goods were purchased to break his contract with the plaintiff. In the absence of such an element, such agreements between manufacturers and wholesalers would, from the standpoint of the plaintiff, have, so to speak, a material effect, and a shackling of business would result which would be altogether unendurable, and which in certain cases might itself even be considered as repugnant to good morals.' "

* * * * *

In another case of the same kind the defendant,

in selling cigarettes at a discount, removed the identifying number, so that it was impossible for the exclusive agent to ascertain which middleman was breaking his contract by not binding sub-dealers. The Court held that the defendant had committed an act repugnant to good morals by wilfully abetting the breach of contract of his suppliers, by buying at various times from them the cigarettes of the plaintiff sold in violation of the agreement made with the plaintiff, by removing the identifying number in order to prevent anyone from finding out his source of supply, and by selling the goods at less than the fixed price. Such acts, the Court held, were not in harmony with the rules of propriety observed by all just and reasonable men and were a violation of section 1.

> Trust Laws and Unfair Competition, pp. 651-652, where are cited the authorities quoted.

In considering the Miles Medical Company and "Sanatogen" cases and their application in a case involving a different state of facts, or rather a total absence of the facts on which those decisions depend, it is well to bear in mind the observation of the Court in the "Sanatogen" Case that,

> "No more is to be decided in each case than is directly an issue."

XV.

TO SUPPORT THE DECREE APPEALED FROM IN THIS CASE IT WILL BE NECESSARY TO DECIDE THAT A PRINCIPAL CANNOT MAKE IDENTICAL CONTRACTS WITH A LARGE NUMBER OF AGENTS AND CONTROL THEIR CONDUCT AS SUCH AGENTS IF TO DO SO WILL FORBID THOSE AGENTS FROM COMPETING WITH EACH OTHER AND THEREBY WITH THE PRINCIPAL HIMSELF.

But if the Court finds itself able to disregard the contract and convert a consignment into an absolute sale, it will further be necessary, to support the decree, to hold that a patentee cannot **by contract** restrict the price at which **the party contracting** may sell the patented article, a limitation never heretofore imposed.

We have discussed these phases of the case thus fully, and may well conclude this part of our argument by quoting from the Button Fastener Case (77 Fed. 288-294) which has met the approval of the Supreme Court, and is the logical predecessor of the Dick Case:

> "Upon what authority are we to circumscribe the exercise of the privileges awarded

a patentee? In considering any question in respect of restraints upon the liberty of contracting, imposed by principles of public policy, we should bear in mind that very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts, this caution was well expressed by Sir George Jessell in Registering Co. v. Sampson, L. R. 19 Eq. 462-465, who said:

'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.'

"Especially is this caution applicable when we sit in judgment upon the limitations which a patentee may put upon the use of his invention."

Under any view of the contract there was no undue restraint of trade.

XVI.

APPLICATION OF THE RULE OF REASON.

We are now ready to advance with the argument a step further and submit that it is immaterial whether the contract under discussion created an agency or effected a sale, for the reason that under the rule of reason as laid down by the Supreme Court in the Standard Oil and Tobacco cases the Sherman law has not been violated.

We submit that the contract between the plaintiff and its agents does not restrain trade within the meaning of the Sherman Act but is only a reasonable provision for the conduct and extension of plaintiff's business and the sale of its products. While the contract fixes the prices at which Ford automobiles can be sold to the public, that is not the only or the principal end sought but is only incidental.

Plaintiff seeks by its agency contract, among other things, to be represented by agents who will not only advance the sale of Ford automobiles but at the same time maintain the standard of service and accommodation to Ford owners which is so

mportant to the popularty of an automoble and more than anything else promotes its sale.

In this connection we can well quote the language used by the Circuit Court of Appeals for the eighth circuit, speaking by Judge Sanborn, in the case of **Joseph P. Whitwell v. Continental Tobacco Company, et al. (125 Fed. 454), 64 L. R. A. 694, 695, 697:**

> "If, on the other hand, it promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245.
>
> "If the contract, combination, or conspiracy which is charged against the defendants

in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law, unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their

goods and the terms at which they would dispose of them to all intending purchasers."

And the same court speaking again by the same judge said, in **Phillips v. Iola Portland Cement Co., 125 Federal, 594, 595.**

"* * * the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate com-

merce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. Hopkins v. U. S. 171, U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S. 171, U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; U. S. v. Joint Traffic Ass'n, 71 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Northern Securities Co. (C. C.) 120 Fed. 721, 725. The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of ce-

ment in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed."

The rule applicable is summed up in Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 704-712, where the court said:

"We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend towards monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect

> are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. U. S. v. E. C. Knight Co., 39 L. Ed. 325, 43 L. Ed. 290-300."

No fact or evidence or statement exists in this case to justify even an inference that trade in automobiles has been in the least restrained by the contract under discussion.

There is nothing in the record in the case at bar to indicate that the contract therein involved was anything more than one of "the ordinary contracts or combinations of manufacturers, merchants, and traders," or that it contained anything more than "the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful."

It is contrary to the knowledge and experience of every man in the community to claim that such a contract could have any effect to restrain trade in automobiles, when it is common knowledge and every-day experience that the different makes of automobiles are too numerous to keep track of, all actively and persistently competing for business. The difficulty that confronts the public is not a trade unduly restrained, but rather how to escape

the solicitations of rival agents eagerly hunting down a prospective or possible purchaser.

As was said by the Circuit Court of Appeals for the fifth circuit, in the case of Cole Motor Car Co. v. Hurst, 228 Fed. 280:

> "There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of the agents or consignees of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellencies. There surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely vary-

> ing prices? Where, then, is the restraint of trade in this transaction?"

It is beyond question that contracts of the character under discussion, not only do not operate to restrict competition, but on the contrary stimulate the agents to greater zeal and activity in pushing sales and thereby directly stimulate competition.

The restraint if any is so far a mere incident to the main purpose of extending the sale of the manufactured product that it cannot bring the contract within the provision of the Sherman act without running counter to the rule of reason which forms the guide to the consideration of the law by the Supreme Court.

The changed view point from which these questions are to be considered was succinctly stated in the case of O'Halloran v. American Sea Green Slate Co., 207 Fed. 187-190.

> "The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever effects or restricts and limits interstate commerce is illegal is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint,

the question of fact to be settled by the court applying the rule of reason."

In discussing the cases in which the Supreme Court enunciated the rule of reason, Judge Lacombe, **United States v. Hamburg-American S. S. Line, et al., 216 Fed. 971, 972, 974,** said:

> "The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman Anti-Trust Act, will be found fully set forth in U. S. v. American Tobacco Co. (C. C.) 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free and unrestricted competition were the sole controlling power to effect the distribution.
>
> "Since the decision above cited, however, there have been two exhaustive opinions of the Supreme Court dealing with this act.

Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.'

" 'Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation or competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusions that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on

the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. * * * The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. Standard Oil Co. v. United States, 221 U. S. 58, 59, 60, 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734."

"'Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words "restraint of trade" at common law and in the law of the country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the

public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.' United States v. American Tobacco Co., 221 U. S. 179, 31 Sup. Ct. 648, 55 L. Ed. 663."

In United States v. Reading Co., 226 U. S. 324, 57 L. Ed. 243-258, the Supreme Court restates the rule as follows:

> "That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil Case, 221 U. S. 1, 55 L. Ed. 619. In that case it was also said that the words "restraint of trade' should be given a meaning

> which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect."

In Nash v. United States, 229 U. S. 373, 57 L. Ed. 1232-5, the Supreme Court again referred to the Standard Oil and American Tobacco Company cases, and said:

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of interest or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

It will puzzle the most astute to bring the contract in the case at bar within the prohibition thus defined.

A contract creating an agency and providing for consignments for sale to the agent, does not disclose any such "intent," nor is its "inherent nature" calculated to unduly or otherwise restrict competition as forbidden by the Sherman law. Nor is there anything in this record from which the

court can conclude that competition has been **unduly restrained** or restrained at all.

It is evident from the language of the law itself and from the numerous cases interpreting it that the object of Congress in the adoption of the Sherman law was not to prescribe the manner in which the individual should conduct his business,—whether directly or through the agents chosen by by him—but rather to forbid and prevent combinations between individuals who might otherwise be competitors, whereby that competition may be in any way restrained. It does violence to the language of the contract between the Ford Motor Company and its agents; it does violence to the manifest intent of regulating the manner in which the company's business should be conducted by its agents; it is a logical absurdity, to say that the contract in question is a contract in restraint of trade under the Sherman law.

It is on the contrary a contract whereby the Ford Motor Company seeks to obtain and secure the widest possible stable market, and the most satisfactory of all advertisements of any business —a body of satisfied customers who have reason to believe each one has received as fair and equitable treatment as any other purchaser of Ford automobiles.

As was said in Whitwell against Continental Tobacco Company:

> "If on the other hand it promotes or but incidentally or indirectly restricts competition while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." And see authorities cited.

No other automobile manufacturer has combined with the Ford Motor Company, but the Ford Motor Company competes in the open market with scores upon scores of other makers of automobiles and the purpose and effect of the contract under consideration is to make that competition as effective as possible, and not to restrain it.

In the Whitwell case just quoted from, the court used the following language which is persuasive in this case:

> "The right of each competitor to fix the price of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition."

And again:

"The tobacco company, and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. * * * There is nothing in the act of July 2, 1890, C. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200) which deprives any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can consti-

tute any restriction upon competition or any restraint upon interstate trade."

It will doubtless be claimed that from the fact that by the terms of the contract the Ford Motor Company received 85% of the list price of its automobiles and that is the maximum amount of cash it expected to obtain, it follows that there was actually a sale to the agent and not a consignment, and this contention has been advanced notwithstanding the clear language of the contract and the agreement that either party might at any time, on notice, cancel the contract and the Ford Motor Company might take back the automobiles and return the 85%, and notwithstanding the other conditions of the contract by which both parties made clear their intention to enter into the relationship of principal and agent, with absolute control by the principal over all transactions in its behalf by the agent.

And there is nothing to impugn the absolute good faith of the contract.

But it is not true to say that the 85% was all that the Ford Motor Company expected to receive from the sale of its machines and the contract contains provisions for other considerations moving to the Ford Motor Company, considerations that, from the standpoint of a manufacturer producing each year hundreds of thousands of automobiles, are

more important than the profit on sales brought about by any local agents.

With a product of such magnitude the problem of reaching the market and obtaining customers, each one of whom must be induced to be a booster for the "Ford," is of far more importance than the mere percentage of profit on specific sales.

With a buying public, in the main ignorant of the qualities of the machine purchased, it is a matter of common knowledge that the popularity of different makes of automobiles depends mainly on the quality of the service given by the selling agents.

Automobiles of no special merit as compared with others selling at the same or lower prices have had a wide popularity because of the carefully cultivated belief of the public that owners of such machines are well taken care of and given good service by the representatives of the manufacturer wherever found.

On the other hand other makes of automobiles of equal or greater merit have been hopelessly condemned and the manufacturer driven into bankruptcy because of the failure of the manufacturer to secure that character of representation by agents that gives satisfaction to owners.

It is a truism that a "satisfied owner is the best advertisement."

To get this character of representation and secure this advertising as a basis on which to build future business of larger dimensions, is the real motive and consideration of the contract under consideration.

For these reasons the Ford Motor Company requires in its contracts with its agents that all agents equip proper shops and be prepared to give, and to give "Ford Service" to Ford owners the world over, no matter where the particular purchase may have been made.

From the broad point of view of a manufacturer of a large and increasing product, looking to the future and a greater business, this is the one most important feature of the agency contract, and all else is subordinate to that and of minor importance.

For today only it might be easier to sell f. o. b. factory, and today the Ford Motor Company might be able to thus dispose of its output.

But to build up and maintain and increase business, a broad, forward looking plan is needed, and of the contracts under consideration we can say, as was said in the case of Whitwell v. American Tobacco Co., hereinbefore quoted from, that the

"main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it."

When the contract is thus capable of a reasonable interpretation based on sound business principles, the only interpretation consistent with the language and intent of the contract, what justification can be found for going outside the record, into the realm of speculation and suspicion, to suggest a sinister purpose to evade a law, and based on such assumed purpose, read into the contract a meaning of which the language is incapable, and therefrom draw the conclusion that the Ford Motor Company is conspiring with its own agent to violate the law, by restraining trade in its own product, for which it had supposed it was trying to obtain the widest market, through the heretofore lawful plan of controlling its own agents.

It is sometimes true that a court may "read between the lines" of a contract to enable it to get at the real intentions of the parties, but never is it permissible to disregard entirely "the lines" of the written contract and find a new and different contract in the blank spaces between the lines.

The unauthorized and wrongful use of the trade name and trademark of plaintiff, the wrongful use of the word "Ford," and other words and phrases,

for the purpose of diverting plaintiff's trade from plaintiff or its duly authorized agents, constituted unfair competition, and an injunction should be granted against its continuance.

Furthermore, the limited agency contract, and other contracts between plaintiff and its agents in consigning Ford cars to them, and granting to each agent exclusive territory, are valid contracts, and will be protected by the courts, and the defendants are guilty of unwarranted and malicious interference with such contract rights. The bill plainly alleges, and the motion to dismiss admits, the vicious and unlawful acts of defendants in inducing plaintiff's agents to break their contracts. The bill of complaint discloses that plaintiff grants to each of its licensed agents a particular and exclusive territory within which such agents are licensed to solicit and arrange sales of Ford cars. A licensed agent in return agrees that he will only solicit and arrange for sales within his particular territory; such contracts granting an exclusive agency within a limited territory are uniformly upheld.

The bill plainly alleges the persistent and continuous efforts of defendants to induce the agents of plaintiff to break their contracts, and to enjoin such wrongful acts is a recognized duty of courts of equity.

Plaintiff was clearly entitled to the relief prayed for and denied by the District Court.

Respectfully submitted,

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